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IN THE

Supreme Court of the United States

October Term, 1961

No. 432

EMPIRE STATE HIGHWAY TRANSPORTATION ASSOCIATION, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA and FEDERAL MARITIME BOARD,

Respondents.

AMERICAN EXPORT LINES, *et al.*,

Intervenors.

PETITIONER'S REPLY

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Petitioner respectfully submits this reply, as permitted by Rule 24(4) of the Revised Rules of the Supreme Court of the United States, to the briefs filed by the Respondents and Intervenors.

POINT I

This case has not been rendered moot or unimportant by reason of the October 3, 1961, amendment to Section 15.

This appeal was not rendered moot by Congressional action. Respondents and Intervenors have incorrectly described the scope and meaning of the recently enacted Section 2 of Public Law 87-346 (75 Stat. 764) which

amended Section 15 of the Shipping Act, 1916, as amended (46 U. S. C. Section 814). Section 2 is inapplicable because this case involves "other persons" subject to the Shipping Act as amended (herein called the "Act") and not water carriers. The issue to be resolved is the legality of charges for accessorial (non-transportation) services which Section 2 does not reach or purport to govern, and not transportation rates which are subject to Section 2.

The text of the Public Law 87-346 and the Committee Reports (H. Rept. No. 498, August 31, 1961; S. Rept. No. 860, August 31, 1961; Conf. Rept. No. 1247, September 20, 1961) shows, of course, that Congress intended only to amend the Act insofar as it applied to the transportation activities of carriers, conferences of carriers and dual rate agreements. In a real sense, the new law is a legislative response to *Federal Maritime Board* v. *Isbrandtsen Company*, 356 U. S. 481 (1958). Since the activities challenged by Petitioner do not relate to or affect carriers or dual rates or conferences which establish transportation rates, Section 2 does not render this appeal moot.

The provision of Section 2 relied upon by Respondents and Intervenors, namely that " * * * tariff rates, fares and charges * * * shall be permitted to take effect without prior approval" is submitted out of context and ignores the legislative history of Public Law 87-346, 75 Stat. 764.

The tariff rates referred to in Section 2 are, obviously, those published by common carriers by water which provide transportation services. This is made clear by the fact that prior approval of tariff rates is not required if the water carrier has complied with the newly adopted Section 18(b) of the Act (Public Law 87-346, Section 4). Quite clearly, Section 18(b) is applicable only to common carriers by water; no reference whatever is made to the activities of "other persons" such as Intervenors who do

not act as water carriers when they engage in truck loading and unloading activities but who are, nevertheless, permitted to operate under Section 15 agreements and are accorded exemption from the anti-trust laws. Public Law 87-346 was neither designed to, nor does not, reduce the area of regulation. On the contrary, the new law expanded the ambit of the Act to cover activities which the Federal Maritime Board previously claimed were not regulated [*Federal Maritime Board* v. *Isbrandtsen Company*, 356 U. S. 481 (1958)].

What Respondents and Intervenors fail to recognize is that "Tariff" No. 5 is a new agreement or a modification of Agreement No. 8005 which required prior Board approval. "Tariff" No. 5 is not a true tariff within the meaning of that term as employed in the Act. Merely calling a document a "tariff" does not create immunity from the requirement of prior agency approval prescribed by Section 15 of the Act. In short, "Tariff" No. 5, despite its label, was not a conventional tariff published by carriers but a new agreement, pure and simple or, at least, a modification of an existing agreement, which, in either case, required prior approval.

If Intervenors are not subject to the same restrictions as carriers by water, e.g., *Section 18(b)* of the new law, then their activities must be subject to prior approval especially since they are accorded exemption from the anti-trust laws. The Act must be strictly construed. Public policy considerations, both domestic and foreign, implicit in the regulation of water carriers which may dictate that carriers be permitted to change transportation rates without prior approval, are absent here. The activities of Intervenors are limited to exclusively the Port of New York and they are not dependent, in any way, upon the policies of foreign governments or foreign na-

tionals, and public policy does not suggest that prior approval, in the facts and circumstances of this case, be waived.

POINT II

The prior legislative history of Section 15 does not now support Respondents' and Intervenors' contentions.

A review of the Congressional reports which accompanied Public Law 87-346, shows that Congress did not accept the Board's long standing but incorrect conclusion that prior approval was not required for a new agreement such as Tariff No. 5. On the contrary, the extensive modifications of Section 15 supports the Petitioner's contention that Congress rejected the Board's earlier consistent but erroneous construction of the statute. Where prior approval is not required, Congress has inserted additional limitations and safeguards. No such safeguard exists in the instance of an agreement such as Tariff No. 5.

The Court of Appeals for the District of Columbia, having determined that "Tariff" No. 5 is an agreement, improperly relied upon canons of construction to avoid the injunction of Section 15 that prior approval is required before the "Tariff" could become effective.

POINT III

There Is a Conflict of Decisions

The petition for a writ of certiorari (pp. 7-14) shows the conflict between the decision of the Court below and *United States Pipe Line Company* v. *Mobile Gas Service*

Corporation, etc., 350 U. S. 332 (1956) and *Isbrandtsen Co.* v. *United States*, 211 F. 2d 51 (1954), cert. den. sub nom. *Japan-Atlantic & Gulf Freight Conference* v. *United States*, 347 U. S. 990 (1954). Moreover, the Court below failed to note that there is a procedure to be followed (as set forth in the *United* case) whereby prior approval could have been required for Tariff No. 5, without rendering Section 15 unworkable. In any event, neither Respondents nor Intervenors can or did reconcile the decision of the Court below with the teaching of *Isbrandtsen-Moller Co.* v. *United States*, 300 U. S. 139, 143 (1937):

> "the act requires that if any contract for a change of those rates is made, the new rates may be charged only after the Board has approved the agreement."

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: November 9, 1961.

Respectfully submitted,

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Counsel for Petitioner.